No. 90-60

In The

Supreme Court of the United States

October Term, 1989

UNION TEXAS PETROLEUM CORPORATION, AGIP PETROLEUM COMPANY and MINATOME CORPORATION,

Petitioners,

versus

P L T ENGINEERING, INC., STATE SERVICE COMPANY, INC., POWER WELL SERVICE, INC., GULF ISLAND-IV, BROWN & ROOT USA., INC. AND SUB SEA INTERNATIONAL, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

CHARLES E. LUGENBUHL*
STEWART F. PECK
NATHAN P. HORNER
LUGENBUHL, BURKE, WHEATON, PECK & RANKIN
Suite 2775, 601 Poydras Street
New Orleans, Louisiana 70130
(504) 568-1990

Attorneys for Respondent, Brown & Root U.S.A., Inc.,

* Counsel of Record

August 6, 1990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Petition No. 90-60 presents three questions for resolution by this Court which Brown & Root U.S.A., Inc. believes may be more precisely stated as follows:

1. Whether state law adopted by Section 4 of the Outer Continental Shelf Lands Act, 43 U.S.C.A. §1333, or federal maritime law governs disputes arising out of the performance of construction contracts on the Outer Continental Shelf.

2. Whether Section 4 of the Outer Continental Shelf Lands Act, 43 U.S.C.A. §1333, embodies a federal policy directing the application of the law of the adjacent state to disputes arising on the Outer Continental Shelf that supersedes contrary contractual choice of law stipulations.

3. Whether Section 4 of the Outer Continental Shelf Lands Act, 43 U.S.C.A. §1333, operates to extend the boundaries of Louisiana Coastal Parishes to the outer limits of the Outer Continental Shelf for the purposes of recordation of Oil Well Liens.

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STATUTORY PROVISIONS INVOLVED

The following statutory provisions, in addition to those set forth in the Petition for Writ of Certiorari, are involved in this case:

43 U.S.C. §1331. Definitions

When used in this subchapter –

(l) The term "development" means those activities which take place following discovery of minerals in paying quantities, including geophysical activity, drilling, platform construction, and operation of all onshore support facilities, and which are for the purpose of ultimately producing the minerals discovered;

(m) The term "production" means those activities which take place after the successful completion of any means for the removal of minerals, including such removal, field operations, transfer of minerals to shore, operation monitoring, maintenance, and work-over drilling.

I. STATEMENT OF THE CASE

Petitioners, Union Texas Petroleum Corporation ("UTP"), Agip Petroleum Company ("Agip") and Minatome Corporation ("Minatome"), are the owners of the leasehold interest in Federal Lease No. OCS-G6677 located in Vermilion Block 237 on the Outer Continental Shelf ("OCS") adjacent to the state of Louisiana (the "Lease"). UTP owns an undivided 50.66667% of the leasehold interest, with Agip and Minatome owning 33.33333% and 16.00000% respectively.

In order to market gas produced on the Lease, UTP initiated a project to construct a gas transportation system. The gas transportation system was to consist of a submerged 12" pipeline, approximately 2.9 miles in length, running from UTP Platform B located on the Lease to a side tap in the 36" Bluewater Pipeline operated by Columbia Gas Company located in Vermilion Block 225 on the OCS. (R. at 171, 190).

To construct the pipeline, UTP contracted with PLT Engineering, Inc. ("PLT") for the design, fabrication and installation of the gas transportation system. On October 14, 1986, Brown & Root U.S.A., Inc. ("Brown & Root")[1] entered into a subcontract with PLT for the construction of a portion of the system. (See Contract, R. at 323). Pursuant to this contract, Brown & Root provided labor, materials, equipment, including a pipe lay barge, and supplies for the construction of the system. The work performed by Brown & Root included laying and burying the 12" pipe which extended between UTP's platform in Vermilion Block 237 and the Bluewater Pipeline in Vermilion Block 225.

Although Brown & Root fully performed its contractual obligations in connection with the construction of the pipeline, it was not paid for its work. Pursuant to the Louisiana Oil, Gas and Water Well Liens Act, La. Rev.

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[1] Pursuant to Rule 29.1 of this Court, Brown & Root states that it is the wholly owned subsidiary of Brown & Root, Inc., which in turn is wholly owned by Halliburton Company. Azteca Transportation Services, Inc., Brown & Root Vickers, Inc. and Greystone Communities, Inc. are non-wholly owned subsidiaries of Brown & Root U.S.A., Inc.

Stat. Ann. 9:4861, *et seq.* (the "Lien Act"), Brown & Root filed a Lien Affidavit and Notice of Claim of Lien on March 10, 1987 in Vermilion, Cameron and Iberia Parishes, the coastal parishes adjacent to the Lease, and also filed the Notice on March 9, 1987 with Minerals Management in New Orleans, Louisiana. (R. at 323).

This action commenced on March 6, 1987 when UTP filed its Complaint in Interpleader in the United States District Court for the Western District of Louisiana. Jurisdiction was asserted under the Outer Continental Shelf Lands Act, 43 U.S.C.A. § 1331, *et seq.* (the Lands Act), and 28 U.S.C.A. § 1331 (West 1986). In addition to Brown & Root, the Complaint named PLT, State Service Company, Inc. ("State Service"), and Sub Sea International Inc. ("Sub Sea") as defendants. (R. at 1). Brown & Root answered and asserted a counterclaim against UTP, Agip and Minatome (hereinafter collectively referred to as "UTP") to enforce its lien rights and to collect for services rendered in connection with the construction of the pipeline. (R. at 171, 249).

The matter was submitted to the District Court on Motions for Summary Judgment filed on behalf of all parties. On March 10, 1988, the District Court filed its first Memorandum Ruling on the Cross-Motions for Summary Judgment which, in part, recognized that there were viable claims under the Lien Act and dismissed UTP's interpleader. (R. at 801). Subsequently, on September 28, 1989, the District Court rendered judgment in favor of Brown & Root. (R. at 1180).

On February 5, 1989, Notice of Appeal was filed by UTP, with respect to the judgment in favor of Brown &

Root, among others. By its Order dated February 24, 1989, the Fifth Circuit consolidated the appeal from this judgment with the appeal of a judgment in favor of Power Well, another lien claimant in this proceeding, which had been previously filed.

On March 7, 1990, the Fifth Circuit, speaking through Judge John R. Brown, held, in part, that the Lands Act, not General Maritime Law, governs disputes arising out of a construction contract on the OCS; that a choice of law provision stipulating the applicability of maritime law violated the federal policy directing the application of the law of the adjacent state to disputes arising on the OCS; and that the oil well liens claimed by the parties were effective. From these adverse rulings, UTP seeks certiorari.

ARGUMENT

Rule 10 of this Court provides that a review of a case on writ of certiorari is a matter of judicial discretion, and will only be granted "when there are special and important reasons therefor." The writ should not be granted except in a case where the settlement of the principles at issue is of importance to the public, as opposed to the parties. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 616 (1955). The decision below was the result of the studied application of settled principles enunciated by Congress, this Court, and the Fifth Circuit, in spite of UTP's transparent attempt to make it appear otherwise.

In essence, the Fifth Circuit resolved a contractual dispute between sophisticated business entities. Rather than seeking rehearing in the Fifth Circuit to redress its disappointment in the ruling of the panel below, UTP has come to this Court and seeks to clothe its dissatisfaction in the guise of "public interest". Moreover, UTP fails to disclose that the decision on which it heavily relies to adopt this guise, *Lewis v. Glendel Drilling Co.*, 898 F.2d 1083 (Cir. 1990), is the subject of a request for rehearing en banc which is being considered by the Fifth Circuit.

The fact that UTP may be disappointed by the Fifth Circuit's adverse ruling in this commercial dispute is of no moment. This court has stressed that is does not sit for the benefit of dissatisfied litigants. *Rice*, 349 U.S. at 74, 75 S.Ct. at 616. As this case raises no issues which require resolution by this Court, as a matter of public interest, UTP's Petition for Certiorari should be denied.

1. THE OUTER CONTINENTAL SHELF LANDS ACT GOVERNS THE SERVICES PERFORMED IN THIS CASE.

UTP contends that the Fifth Circuit erred in applying OCSLA adopted state law to this dispute instead of General Maritime Law. Relying on this Court's decision in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485 (1986), and the subsequent decision of another panel of the Fifth Circuit in *Lewis v. Glendel Drilling Co.*, 898 F.2d 1083 (5th Cir. 1990), UTP asserts that the application of General Maritime Law is mandatory as a result of Brown

& Root's use of vessels in the performance of the construction contract. The construction of the pipeline occurred on the OCS; so, by necessity, the work performed to build the pipeline involved the use of vessels. However, Brown & Root contracted to build the pipeline, not to charter its vessel as UTP implies. Because construction on the seabed of the OCS is not related to traditional maritime activity, UTP's argument is absolutely meritless.

The purpose of the Lands Act was to define a body of federal law applicable to the seabed, the subsoil and the structures erected upon them. 43 U.S.C.A. § 1333(a)(2)(A). It was thought that existing federal law might be inadequate to cope with the full range of potential legal problems which could arise on the OCS. Accordingly, Congress intended that the law of the adjacent State would become surrogate federal law. This law was to apply to the OCS *to the exclusion* of rules of admiralty. *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 89 S. Ct. 1835 (1969). The Act expressly extended this surrogate law to the construction and operation of pipelines transporting resources produced from the OCS. 43 U.S.C.A. § 1331(l), (m), and § 1333 (a)(1); *see also Continental Casualty Co. v. Associated Pipe & Supply Company*, 447 F. 2d 1041 (5th Cir. 1971).

The Fifth Circuit properly viewed its prior decision in *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223 (5th Cir. 1985) as controlling. *Laredo* involved an action for sums due under a contract to construct a platform on the OCS. Laredo was charged with the responsibility of transporting material and supplies to the work site, as well as performing the actual labor in connection with the construction of the platform.

Laredo argued that its construction contract was within maritime jurisdiction, and governed by maritime law, because, to perform its contractual obligations, Laredo had to engage numerous seamen and ocean-going vessels. The court rejected this contention and held that the contract was governed by state law, adopted through the Lands Act, not general maritime law.

> Laredo's principal obligation under the contract was the construction of a stationary platform, and . . . it is the alleged breach of this obligation that gave rise to the instant action. While the contract no doubt contemplated the hiring of vessels and seamen to build the structure, the subject matter of this case has no direct relationship with [the] traditional subjects of maritime law. It is fundamental that the mere inclusion of maritime obligations in a mixed contract does not, without more, bring non-maritime obligations within the pale of admiralty law. That the contract contemplated in part the use of instruments of admiralty, therefore, is not sufficient to oust OCSLA-adopted state law.

Laredo, 754 F.2d at 1231-2, *see also Wilson v. J. Ray McDermott & Co.*, 616 F.Supp. 1301, 1303 (E.D.La. 1985).

While Brown & Root was charged with the transportation of labor, material and supplies to the work site, and while Brown & Root's work involved the use of vessels and seamen, *its principal obligation was to construct a gas transportation system on the seabed of the OCS. See* Contract: Art. II(o), Art. IIIA. *Laredo* holds that such contracts bear no significant relationship to traditional maritime activity. UTP's attempt to recharacterize Brown & Root's contract as a vessel charter-party, and thus to distinguish *Laredo*, is completely unsupported by the record.

This Court's decision in *Tallentire* requires no different result. That case arose out of the crash of a helicopter on the high seas while ferrying OCS platform workers to shore. The plaintiffs sought to apply certain state remedies adopted by OCSLA instead of the Death on the High Seas Act ("DOHSA"), a remedy applicable under maritime law. This court applied DOHSA because the accident occurred miles from an OCSLA situs while the helicopter was engaged in traditional maritime activity – ferrying passengers from an artificial island to shore. Unlike the situation here, maritime law could be said to apply of its own force. *Tallentire*, 477 U.S. at 217-19, 106 S.Ct. 2491-93.

UTP's reliance on *Glendel Drilling* is also misplaced. Although *Glendel* addressed the question of whether state or maritime law applied to a contract for services offshore, that case arose in *territorial* waters, not on the OCS. Relying on *Laredo*, the *Glendel* court recognized that, due to OCSLA, "whether the contract covered activity in state territorial waters or on the Outer Continental Shelf will . . . have an impact" on the choice of applicable law. *Glendel*, 898 F.2d at 1087. The "conundrum" the court discussed in *Glendel* related largely to the inconsistency that may exist when maritime law is applied to "certain mineral exploration contracts when the drilling occurs in state territorial waters . . . while state law governs precisely the same contractual relationship a few miles further offshore pursuant to the OCSLA." *Id.* The court did not question the application of OCSLA to mineral exploration contracts, or construction contracts, performed on the OCS.

Any uncertainty that may exist in the Fifth Circuit with regard to the application of state law or maritime remedies to drilling contracts performed in *territorial* waters is not implicated here. This court should not permit UTP's reading of *Glendel* to mislead it into a belief that this confusion exists with respect to contracts performed on the OCS, or that this case provides a vehicle to address the issue.

Furthermore, at the time this opposition was submitted, a Petition for Rehearing in *Glendel Drilling* was pending in the Fifth Circuit, a fact UTP has failed to disclose. If the issues involved in this proceeding are caught up in what have been characterized as "inconsistent lines of authority" within the Fifth Circuit, and if the Fifth Circuit accepts rehearing *en banc*, any conflicts in these decisions may be more appropriately resolved in the first instance by that court. *See Wisniewski v. United States*, 353 U.S. 901, 902, 77 S.Ct. 634 (1957).[2]

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[2] In addition, the issue of whether or not maritime law ultimately applies to services performed in connection with offshore construction contracts may be academic insofar as oil well liens are concerned. Maritime law does not invariably refuse to recognize and enforce *state-created* liabilities, and still leaves a wide scope for the operation of those rights. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 372-379, 79 S.Ct. 468, 480-83 (1959), *Just v. Chambers*, 312 U.S. 383, 387-8, 61 S.Ct. 687, 690-92 (1941). There is no question that fixed structures erected on the OCS are governed by OCSLA adopted state law, including any lien rights which are created by that law. 43 U.S.C. § 1333(a)(2)(A). It is also clear that towing, barging and furnishing equipment in connection with the construction of a gathering line, as was the case here, are services

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Contrary to UTP's contentions, the issue of whether OCSLA applies to the construction contracts on the OCS is not unsettled. Certiorari on this issue should be denied.

2. FEDERAL POLICY DIRECTING THAT THE LAW OF THE ADJACENT STATE WILL GOVERN DISPUTES ARISING ON THE OCS SUPPORTS THE REFUSAL OF THE APPELLATE COURT TO ENFORCE CHOICE OF LAW PROVISIONS IN OCS CONTRACTS.

Ignoring the thrust of several decisions of this Court, as well as settled precedent of the Fifth Circuit, UTP contends that the panel below erred in failing to give effect to choice of law provisions contained in the construction contracts.[3] UTP asserts that the court, "without

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for which an oil well lien is granted by Louisiana law. La.R.S. 9:4861, *See Continental Casualty Co. v. Associated Pipe & Supply Co.*, 310 F.Supp. 1207 (E.D.La. 1969), *aff'd in part, modified in part, vacated and remanded in part*, 447 F.2d 1041 (5th Cir. 1971). Even if the construction services supplied here were maritime contracts, that fact alone should not preclude the contractor from asserting a privilege *against fixed structures or real estate* expressly extended to secure those services by state law.

[3] Each of these provisions provided that:

> If the work to be performed pursuant to this contract is conducted in whole or in part over the Continental Shelf or in navigable water then this contract shall be governed and construed in accordance with the General Maritime Laws of the United States . . .

Contract for Union Texas Petroleum Vermillion Pipeline Project Fabrication and Installation of Pipeline, Exh. A, § 21.1 (Oct. 14, 1986) (Contract by and between Brown & Root and PLT).

analysis", placed an unreasonable constriction on OCSLA which denies parties the contractual freedom to stipulate applicable law where no public policy is violated. To the contrary, Judge Brown applied settled law recognizing the paramount *federal* policy embodied in OCSLA – that the substantive law of the adjacent state will apply to disputes arising on the OCS. 43 U.S.C.A. § 1333(a); *see also Matte v. Zapata Offshore Co.*, 784 F.2d 628 (5th Cir.) *cert. denied*, 479 U.S. 872 (1986) (involving a virtually identical choice of law provision contained in a master service agreement).

This Court has previously stated that the Lands Act embodies an "explicit choice-of-law provision" that "*supercede[s]* the normal choice-of-law rules that the forum would apply." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 482 n. 8, 101 S.Ct. 2877 n. 8 (1981) (emphasis added). Furthermore, *Matte* specifically held that, as a matter of *federal* policy, a choice of law provision cannot displace OCSLA adopted state law even where choice of law provisions are recognized by the law of the adjacent state. *Matte*, 784 F.2d at 631. UTP has not only failed to address this policy, but even to acknowledge its existence.

The true reason UTP contends that maritime law should apply either of its own force, or through a choice of law provision, is because its contract contains no lien waiver. It believes that the application of maritime law precludes the attachment of liens to its pipeline. This is not the case. Not only does maritime law recognize certain state created rights[4], but also the contracts at issue in

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[4] See Footnote 2, *supra*.

this case specifically recognized the existence of liens and their attachment to the pipeline. (Contract for Union Texas Petroleum Vermilion Pipeline Project Fabrication, and Installation of Pipeline, Exh. A § 11.1.2 (Oct. 14, 1986) (Contract by and between Brown & Root and PLT)).

Judge Brown applied established Fifth Circuit precedent, and the statements of this Court recognizing paramount federal policy. Brown & Root can say it no better than Judge Brown as to the settled nature of the law:

> We find it beyond any doubt that OCSLA is itself a Congressionally mandated choice of law provision requiring that the substantive law of the adjacent state is to apply even in the presence of a choice of law provision in the contract to the contrary. *See Matte v. Zapata Offshore Co.*, 784 F.2d 628, 631 (5th Cir.) *cert. denied* 479 U.S. 872, 107 S.Ct. 247, 93 L.Ed. 2d 171 (1986); *Wooton v. Pumpkin Air, Inc.*, 869 F.2d 848, 852 (5th Cir. 1989); *See also Gulf Offshore Co. v. Mobil Oil Corp.* 453 U.S. 473, 482 n. 8, 101 S.Ct. 2870, 2877 n. 8, 69 L.Ed 2d 784, 794 n. 8 (1981) ("OCSLA [sic] does supercede the normal choice-of-law rules that the forum would apply."); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 102-03, 92 S.Ct. 349, 353-54, 30 L.Ed 2d 296, 303 (1971).

Union Texas Petroleum, 895 F.2d at 1050.

This Court should be asked neither to undermine a Congressional policy choice nor to reiterate settled law. Certiorari with respect to this issue should be denied.

3. THE FIFTH CIRCUIT OPINION CANNOT BE READ TO EXTEND THE POLITICAL JURISDICTION OF LOUISIANA TO THE OCS.

As its final ground for certiorari, UTP contends that the Fifth Circuit erroneously gave effect to oil well liens

asserted by Brown & Root and other subcontractors who provided labor, equipment and material for the construction of its pipeline. In order to preserve a privilege granted by the Lien Act, a notice of the lien must be filed in the mortgage records of the parish where the property is located. La. Rev. Stat. Ann. 9:4862A(1) (West Supp. 1990). UTP argues that to permit a contractor to record an OCS lien would be to extend the *political* jurisdiction of Louisiana to the OCS in violation of OCSLA. (Petition at 25).

UTP did not make this argument below. The thrust of UTP's arguments below were that the recordation requirements of the Lien Act could not be satisfied with respect to lien claims arising on the OCS because the OCS location was not within the physical boundaries of the Louisiana coastal parishes. At no time in its briefs did UTP argue that application of the Lien Act would extend Louisiana sovereignty to the OCS. *See Union Texas Petroleum,* 895 F.2d at 1050. Because UTP did not raise this contention in the Court of Appeals, it should not be permitted to do so now. *Singleton v. Wulff,* 428 U.S. 109, 120, 96 S.Ct. 2868, 2877 (1976), *Youakim v. Miller,* 425 U.S. 231, 233-4, 96 S.Ct. 1399, 1401 (1976).

Nevertheless, it is clear that the Lands Act itself extends the boundaries of the adjacent state to the outer margin of the OCS and treats the area as if it were located within the state's physical boundaries[5]. 43 U.S.C. § 1333(a)(1), (2)(A). The fact that the Fifth Circuit used

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[5] This precisely the approach adopted by Louisiana in La. Rev. Stat. Ann. 49:6, which extends the boundaries of the coastal parishes to the limits of Louisiana territorial waters.

Louisiana law to determine the appropriate location for recordation of the lien in no way extends the boundaries of Louisiana sovereignty to the OCS in violation of OCSLA.

The minutia of where or how a lien is recorded is precisely the type of issue that this Court has indicated is not worth its time. The intervention of this Court is not required.

CONCLUSION

The federal policy directing the application of the law of the adjacent state to disputes arising on the OCS has been applied with consistency by this Court, and the Fifth Circuit. UTP is asking this Court to upset this consistency solely to relieve it of an adverse judgment in a private commercial dispute. Accordingly, the Petition of UTP for Certiorari should be denied.

Respectfully submitted,

CHARLES E. LUGENBUHL #8933
STEWART F. PECK #10403
NATHAN P. HORNER #14381
LUGENBUHL, BURKE, WHEATON,
PECK & RANKIN
Suite 2775, 601 Poydras Street
New Orleans, LA 70130
Telephone: (504) 568-1990
Attorneys for Brown & Root U.S.A., Inc.